12

Supreme Court of the United States

OCTOBER TERM—1952.

No. 363

JOHN DONALD WALKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETER L. F. SABBATINO,
Attorney for Petitioner.

TABLE OF CONTENTS

	PAGE
Petition for Issuance of a Writ of Certiorari	1-8
A. Jurisdiction	2
B. Opinion Below	2
C. Summary Statement of Matters Involved	2-3
(1) Judgment and Sentence	2-3
(2) Proceeding under 28 U. S. C. A. § 2255	3-5
(a) Petition in District Court	3-4
(b) Answer	4
(c) Reply	4-5
(d) Reargument	5
D. Questions Presented	6
E. Reasons for Issuance of Writ	7-8
Brief:	
Jurisdiction	10
Résumé of Facts	10-12
POINT I—The District Court erred in not granting petitioner a hearing and in not making findings of fact and conclusions of law before deciding his petition under 28 U. S. C. A. § 2255	12-18
POINT II—Petitioner's arrest was illegal for the warrant of arrest was void in that it was issued upon an insufficient complaint	18-23
POINT III—Petitioner's waiver of examination at his arraignment after his arrest does not bar him from now attacking the complaint, the warrant of arrest, and all the evidence obtained while he was under such illegal arrest	24-27

PAGE

Point IV—Petitioner's arrest being illegal, the evidence obtained therefrom, including petitioner's confession, was also illegal and, therefore, incompetent to support the judgment of conviction 27-32

Point V—Petitioner is entitled to relief under 28 U. S. C. A. § 2255 33-35

Conclusion 36

Appendix 37-39

Cases Cited

PAGE

Brown v. Mississippi, 297 U. S. 278, 286 35
Byars v. United States, 273 U. S. 28 ..... 7, 20

Cherrie v. United States, 179 F. 2d 94 14

Go Bart Importing Co. v. United States, 282 U. S. 344, 354 ..... 7, 21
Gouled v. United States, 255 U. S. 298 32
Grau v. United States, 287 U. S. 124 ..... 7, 20

In Re Rule of Court (e. e.) Ga. 1877, Fed. Cas. No. 12, 125 22

James v. United States, 175 F. 2d 769 14
Jeffers v. United States, 187 F. 2d 498 29

McNabb v. United States, 318 U. S. 332 ..... 8, 15, 32
Malinski v. New York, 324 U. S. 401 17
Meyers v. United States, 181 F. 2d 802 33
Moore v. Dempsey, 261 U. S. 86, 91 35

PAGE

Nueslein v. District of Columbia, 115 F. 2d 690 ....8, 15, 30

People ex rel Perkins v. Moss, 187 N. Y. 410, 80 N. E. 383 26

Rice v. Ames, 180 U. S. 371 21

Silverthorne Lumber Co. v. United States, 251 U. S. 385 .....15, 32
Simmons v. United States, 18 F. 2d 85, 88 21
Smith v. United States, 187 F. 2d 192, 197 34
Stroble v. California, 343 U. S. 529 17

United States v. Baumert, 179 F. 735 22
United States v. Carignan, 342 U. S. 36 .....7, 15, 31
United States v. Gokey, 32 F 2d 793, 795 .....22, 24, 26
United States v. Hayman, 342 U. S. 205 .....7, 13, 14
United States v. Jeffers, 342 U. S. 48 29
United States v. Morgan, 222 U. S. 274 21
United States v. Paglia, 190 F. 2d 445 14
United States v. Ruroede, 220 F. 210 .....22, 24
United States v. Setaro, 37 F. 2d 134, 137 31
United States v. Von Willer, 181 F. 2d 774 14
United States v. Wells, 225 F. 320 22
Upshaw v. United States, 335 U. S. 413 32

Weeks v. United States, 232 U. S. 383 32
Worthington v. United States, 166 F. 2d 557 .....7, 15, 23

Ziebart v. United States, 185 F. 2d 124 14

Statutes Cited

United States Code:

Title 28, Section 2255—Appendix C 12, 19, 38

Rules Cited

PAGE

Federal Rules of Criminal Procedure:

Rule 3—Appendix B 19, 38

Rule 4—Appendix B 19, 38

Rule 40—Appendix B 19, 38

United States Constitution:

Fourth Amendment—Appendix A 19, 37

Fifth Amendment—Appendix A 30, 37

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner John Donald Walker respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, dated June 2, 1952, affirming an order of the United States District Court, for the Southern District of New York, dated January 10, 1952, denying in all respects a motion made by petitioner, under 28 U. S. C. A., § 2255, to vacate and set aside a judgment and sentence imposed upon him on May 31, 1950, and discharging him from detention and imprisonment; and to review an order entered on January 18, 1952, in the United States District Court for the Southern District of New York, denying, upon reargument,

petitioner's motion to vacate his judgment and sentence (61-3).*

Associate Justice Robert H. Jackson, by an order dated September 1, 1952, duly extended petitioner's time to file a petition for the issuance of a writ of certiorari to and including September 27, 1952, the date of filing herein.

A.

Jurisdiction

The original jurisdiction of the United States District Court in this case is based upon 28 U. S. C. A., § 2255. The jurisdiction of this Court to issue a writ of certiorari to review the order of affirmance rendered by the Court of Appeals is invoked under 28 U. S. C. A., § 1254, and under Rule 38 of the Rules of the Supreme Court of the United States.

B.

Opinion Below

The opinion of the Court of Appeals in this case is reported in 197 F. (2d) 287.

C.

Summary Statement of Matters Involved

(1) Judgment and Sentence

Prior to the institution of his proceeding under 28 U. S. C. A., § 2255, petitioner was found guilty in the United States District Court, for the Southern District of New

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* Numbers in parenthesis refer to the pages in the Record on Appeal to the Court of Appeals from a denial of petitioner's motions under 28 U. S. C. A., § 2255. The references to the trial record refer to the record of the second trial upon the appeal to the Court of Appeals from the judgment of conviction. The trial record was heretofore filed in this court upon petitioner's application for a writ of certiorari to review his conviction (Docket No. 303, October, 1951, Term).

York, on both counts of an indictment which accused him with unlawfully transporting in interstate commerce from Texas to New York two sums of money in violation of 18 U. S. C. A., §§ 415 and 418 (Trial Record, 601, 7-8). The verdict of guilt was announced by the jury nineteen hours after the case was submitted, and after the jury twice reported to the trial Court for additional instructions (Trial Record, 594-601). Petitioner was sentenced on May 31, 1950, to a total of fifteen years' imprisonment—ten years and a fine of $10,000.00 upon the first count, and five years and a fine of $10,000.00 upon the second count, both sentences to run consecutively (6).

The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit on July 10, 1951, Judge Jerome Frank dissenting and voting for a new trial (190 F. (2d) 481). Certiorari was denied by this Court (342 U. S. 868), and a re-hearing upon such application was also denied (342 U. S. 899).

On May 31, 1952, upon the application of petitioner, his sentence was reduced by the District Court to a term of ten years on count one, and a term of five years on count two, both sentences to run *concurrently*, and the fines of $10,000.00 upon both counts were remitted (62).

(2) Proceeding under 28 U. S. C. A., § 2255

(a) Petition in the District Court

After his conviction was affirmed by the Court of Appeals, petitioner applied to the United States District Court for the Southern District of New York, under 28 U. S. C. A., § 2255, for an order to vacate and set aside the judgment and sentence imposed upon him and discharging him from detention and imprisonment (4-27). His prayer for relief was based upon the ground that his indictment, trial and conviction, in New York resulted from his illegal arrest in Maryland, on August 29, 1947, pursuant to a

warrant of arrest issued in Kentucky; that federal government officers suppressed the evidence of his illegal arrest, to wit: the complaint and warrant by which such unlawful act could be proven; that his indictment, trial and conviction in New York, rested upon an alleged oral confession and tangible evidence unlawfully seized by means of his illegal arrest and while petitioner was in illegal custody upon an unrelated Kentucky charge subsequently conceded to be incapable of proof; that such arrest and the evidence obtained therefrom, including the alleged oral confession, were not attacked by petitioner at his trial and on his appeal because the government failed to file promptly, as required by law, the warrant of arrest and the complaint upon which it was issued and, although petitioner made repeated requests therefor, such documents were not made available to petitioner until after his trial and conviction and after the affirmance of his appeal (4-27).

(b) Answer to Petition in District Court

In his answer to Walker's petition, the United States Attorney asserted that petitioner's failure to attack the sufficiency of the Kentucky District Court complaint at his arraignment before a Commissioner bars him from attacking it at this time (30); that the government's delay (more than two years) in filing the complaint was a trivial irregularity (30-31); that petitioner's failure to attack the legality of his confession on his appeal bars him from raising such point in his proceeding under Section 2255 of Title 28, U. S. C. A. (31). Annexed to the government's answering affidavit is a letter from the Clerk of the District Court in Kentucky which states that the complaint was filed in that Court on December 31, 1949 (32, Exhibit 1).

(c) Reply

In his reply, petitioner made note of the fact that December 31, 1949, the date of the alleged filing of the arrest

warrant, was more than *two years after his arrest* (35). To his reply, petitioner annexed correspondence in proof of his vain attempts to secure a copy of the complaint prior to his trial and conviction (39-50). Petitioner specifically requested a hearing in the District Court so as to afford him an opportunity of offering evidence in support of the claims made by him in his petition and evidence of his efforts, before and after December 31, 1949, to secure a copy of the complaint (36-7).

(d) Reargument in the District Court

After the District Court, without granting a hearing, denied petitioner relief under 28 U. S. C. A., § 2255, he applied for a reargument and submitted correspondence, wherein the Clerk of the United States District Court for the Eastern District of Kentucky acknowledged on *January 3, 1952*—long after petitioner's trial and conviction—that he only *recently* located in his Court the complaint upon which the warrant of arrest was issued (59). Upon reargument, the District Court adhered to its original decision denying petitioner a hearing and relief under 28 U. S. C. A., § 2255 (60).

Under 28 U. S. C. A., § 2255, the petitioner was enttiled to a hearing and findings of fact and conclusions of law because the District Court did not decide the petition solely upon the files and records of the case, but also considered an affidavit and exhibit, submitted by the government in opposition.

Petitioner respectfully urges that the matters herein involved present inportant questions in the administration of federal criminal justice, involving a recent remedial statute.

D.

Questions Presented

1. Did the Court of Appeals err in affirming an order of the District Court denying in all respects a motion made by petitioner under 28 U. S. C. A., § 2255, without granting him a hearing, although his petition alleged facts which, if proven, would establish a deprivation of constitutional rights amounting to a denial of the essence of a fair trial, and which factual issues were not determinable by the files and records of the case?

2. Did the Court of Appeals err, in holding sufficient as a matter of law, a complaint, upon which a warrant of arrest was issued, that did not state the essential facts constituting the purported offense; that did not state facts competent in the trial of the case before a jury; that was made by a government officer, John W. Core, who had no personal knowledge of the facts, and who failed to state the source of his information and the name of his informant or the name of the person defrauded, and which complaint did not allege between what states the property was illegally transported but merely asserted, upon hearsay, that petitioner committed a crime?

3. Did the Court of Appeals err in holding that petitioner's waiver of examination deprives him of the fundamental right of challenging process insufficient to confer jurisdiction, and of attacking the legality of his arrest and the evidence derived from such arrest?

4. Did the Court of Appeals err in overruling petitioner's contention that his confession to the crime and other evidence were illegal and inadmissible against him by reason of the fact, as claimed by petitioner, that such confession and other evidence were obtained as a result of a trespass involving his illegal arrest and seizure of his effects?

5. Did the Court of Appeals err in holding that petitioner is not entitled to relief under 28 U. S. C. A., § 2255. ~~but upon probable cause, supported by oath or affirma-~~

E.

Reasons for Issuance of Writ

1. In affirming the order of the District Court denying petitioner a hearing on his motion under 28 U. S. C. A., § 2255, the Court of Appeals held precisely contrary to the recent decision of this Court in *United States* v. *Hayman*, 342 U. S. 205, 72 S. Ct. 263, 272.

2. In holding the Kentucky complaint sufficient as a matter of law, the Court of Appeals ignored the mandate of the Fourth Amendment that, "no warrant should issue, but upon probable cause, supported by oath and affirmation", and invoked a new concept of law precisely contrary to applicable decisions of this Court in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 354; *Byars* v. *United States*, 273 U. S. 28; *Grau* v. *United States*, 287 U. S. 124; and in conflict with the case of *Worthington* v. *United States*, 166 F. (2d) 557, decided by the Court of Appeals for the Sixth Circuit.

3. In holding that a waiver of examination upon arrest thereafter deprives a prisoner of the fundamental right to attack a process insufficient to confer jurisdiction, the Court of Appeals has, without precedent, so far departed from the accepted course of judicial proceedings as to warrant the issuance of a writ of certiorari by this Court.

4. The decision of the Court of Appeals—that an alleged oral confession, secured by means of a trespass against the person and effects of the petitioner, was nevertheless admissible in evidence against him—is in conflict with applicable decisions of this Court in *United States* v. *Carignan*, 342 U. S. 36, 72 S. Ct. 97; *McNabb* v. *United*

States, 318 U. S. 332, and of the Court of Appeals for the District of Columbia, in *Nueslein* v. *District of Columbia*, 115 F. (2d) 690.

5. Petitioner is entitled to relief under 28 U. S. C. A., § 2255, since the proof of violations of his constitutional rights was suppressed and not made available to him until after his trial and conviction, thereby constituting a violation of due process depriving him of a fair trial. One of the reasons assigned by the Court of Appeals in affirming the order appealed from is inapplicable to the case at bar. Petitioner does not invoke 28 U. S. C. A., § 2255 to review trial errors, as the Court of Appeals assumes; petitioner seeks relief because of violations of his constitutional rights at the time of his arrest; these constitutional matters were not raised at petitioner's trial and on his appeal because of the suppression by government officials of the evidence establishing such violations.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination, on a date certain to be therein named, the full and complete transcript of the proceedings of said Court herein, entitled John Donald Walker against United States of America, Docket No. 22361, and that the judgment of said Court be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated, this 27th day of September, 1952.

SABBATINO & TODARELLI,
Attorneys for Petitioner,
Office and Post Office Address:
233 Broadway,
Borough of Manhattan,
New York 7, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that in my opinion it is well founded and the cause is one in which the petition should be granted.

L. F. SABBATINO,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM—1952.

No. .....

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the questions presented, and the factual matter relevant to this application, appear in the petition to which this brief is annexed.

Resumé of Facts

On August 29, 1947, petitioner was arrested in Maryland on a warrant issued at Lexington, Kentucky, upon a charge other than that for which he was subsequently indicted, tried and convicted in New York (4). On the very day of petitioner's arrest, Mary Ashe, who believed herself to be his wife, made no charge against petitioner (Trial Record, Court's Exhibit 2, 659, 438).

After his arrest, petitioner allegedly consented to a search of his luggage left in the possession of Mary Ashe, when petitioner was lodged in jail (5). This search disclosed a letter revealing petitioner's prior marriage to Clara Duerr Walker and thereby established that his subsequent marriages to Sally Grehan and to Mary Ashe were bigamous (5; Trial Record, 22, 387, 482, 492). The government agent admitted that, prior to the search of petitioner's luggage, he had no knowledge of petitioner's wife, Clara Duerr Walker (77). Upon this discovery by federal agents, Mary Ashe made the accusation against petitioner which formed the basis for the subsequent indictment in New York (Trial Record, 441).

While petitioner was under arrest in Maryland, he allegedly made an oral confession to the crime later charged against him in the New York indictment (Trial Record, 432, 497).

Petitioner claims that the information obtained as a result of the search of petitioner's luggage, the accusation made by Mary Ashe, and petitioner's alleged confession and other admissions all led to his indictment, trial and conviction in New York (8). At petitioner's trial in New York, the government made use of petitioner's alleged confession and of other evidence obtained while petitioner was under illegal arrest (Trial Record 386, 431, 474, 482, 492, 432, 496).

After many unsuccessful efforts, both prior and subsequent to his trial and conviction, to secure a copy of the complaint upon which he was arrested in Maryland, and after his conviction was affirmed on appeal, petitioner, on October 12, 1951, succeeded in obtaining a copy of the complaint from the files of the United States Attorney for the District of Maryland (7). After securing a copy of the complaint upon which the warrant of arrest was issued and pursuant to which petitioner was arrested in Maryland,

upon a charge later conceded to be
proceeded, under 28 U. S. C. A., § 22ovable, petitioner
ing his judgment of conviction upopr an order vacat-
complaint and warrant, evidencing h ground that the
suppressed; that such proof was negal arrest, were
petitioner until after his trial and ade available to
arrest was illegal in that the warrantviction; that his
on an insufficient complaint and that arrest was issued
and conviction in New York resulted f indictment, trial
and from evidence, including his all his illegal arrest
obtained while he was in illegal custo oral confession,
the Kentucky charge that the govern Maryland upon
not provable. nt conceded was

POINT I

The District Court erred in not nting petitioner a hearing and in not making findin of fact and conclusions of law before deciding his etition under 28 U. S. C. A., § 2255.

Section 2255 of Title 28 of the Unit States Code provides, in part, as follows:

> "Unless the motion and the file nd records of the case conclusively show that the pr ner is entitled to no relief, the court shall cause ice thereof to be served upon the United States ttorney, grant a prompt hearing thereon, determine e issues and make findings of fact and conclusions law with respect thereto. * * *"

It appears, therefore, that upon pre ntation of a petition under 28 U. S. C. A., § 2255, the strict Court may: (1) deny the motion summarily upon t ground that "the files and records of the case conclusi ly show that the prisoner is entitled to no relief", or (2) "cause notice

thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto".

An examination of the record of this case discloses that the District Court, in dismissing the petition in the case at bar, used neither of the two alternatives referred to above.

In its memorandum in support of its decision, the District Court said, in part (51):

> "The file and records of the case conclusively show that the defendant is entitled to no relief under 28 U. S. C. A., 2255."

It would seem from the above memorandum that the District Court, in dismissing the petition, sought to use the first of the two alternatives referred to above. However, an examination of what occurred prior to the making of the decision shows that the District Court did not use the first alternative. The record discloses that the District Court did not, upon presentation of the petition, summarily dismiss it solely upon the files and records of the case. Instead, the District Court, before deciding the petition, considered an answering affidavit and exhibits submitted by the United States Attorney (52).

Since the order of the District Court recites that it was based, in part, upon the affidavit and exhibits submitted by the United States Attorney (52), it is evident that the petition was dismissed, not upon the file and records of the case only, but also upon *other evidence submitted to the Court*. This being so, petitioner was entitled to a hearing, before the District Court passed upon the petition.

In *United States* v. *Hayman*, 342 U. S. 205, 72 S. Ct. 263, 273, this Court, by Chief Justice Vinson, said:

> "* * * The issues raised by respondent's motion were not determined by the 'files and records' in the trial court. In such circumstances, Section 2255 requires that the trial court act on the motion as follows: '* * * cause notice thereof to be served upon the United States attorney, *grant a prompt hearing thereon,* determine the issues and make findings of fact and conclusions of law with respect thereto'. (Emphasis supplied.) In requiring a 'hearing', the Section 'has obvious reference to the tradition of judicial proceedings'. Respondent, denied an opportunity to be heard, has lost something indispensable, however convincing the *ex parte* showing."

To the same effect:

Ziebart v. *United States,* 185 F. (2d) 124 (5th Cir., 1950);
Cherrie v. *United States,* 179 F. (2d) 94 (10th Cir., 1949);
James v. *United States,* 175 F. (2d) 769 (5th Cir., 1949);
United States v. *Von Willer,* 181 F. (2d) 774 (7th Cir., 1950).

A hearing under 28 U. S. C. A., § 2255, requires the production of the prisoner.

United States v. *Hayman, supra;*
United States v. *Paglia,* 190 F. (2d) 445.

In the case at bar, petitioner was not produced in Court and his testimony was not taken.

In his petition to the District Court, petitioner requested that the judgment of conviction be set aside on the ground that it rested, in part, upon evidence obtained in violation of the Fourth Amendment of the Constitution of the United

States while petitioner was in illegal custody on another charge, and that his indictment, trial and conviction in New York resulted from the suppression by government officers of evidence of his illegal arrest.

As to this matter, the District Court, in its opinion, stated (51):

> "It is unnecessary, in determining this motion, to pass upon the validity of the defendant's arrest."

The foregoing statement of the District Court in the case at bar ignores the decisions of this Court and of the Court of Appeals—that evidence obtained as a result of an illegal arrest, in violation of the Fourth Amendment, must be suppressed and that a judgment resting upon such illegal evidence may not stand.

> *United States* v. *Carignan,* 342 U. S. 36, 72 S. Ct. 97;
> *McNabb* v. *United States,* 318 U. S. 332;
> *Nueslein* v. *District of Columbia,* 115 F. (2d) 690;
> *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385;
> *Worthington* v. *United States,* 166 F. (2d) 557, 562, 564.

Since an illegal arrest makes inadmissible evidence obtained therefrom, the District Court was in error in holding that it was unnecessary to pass upon the validity of petitioner's arrest.

The District Court based its decision upon its finding that the record of petitioner's second trial "fails to disclose that the conviction therein was predicated upon evidence obtained by the government *solely* as a result of such assumed illegal detention and search" (51).

While we do not agree with the District Court that the record must disclose that the conviction was predicated

"upon evidence obtained by the government *solely* as a result of such assumed illegal detention and search", we will accept, *arguendo,* the District Court's criterion and establish, nevertheless, that petitioner's conviction does rest upon evidence obtained by the government solely as a result of petitioner's illegal arrest.

An important link in the chain of evidence upon which the jury reached its verdict of guilt was petitioner's alleged oral confession to the government agents, while he was under duress and illegal arrest in Maryland on the Kentucky charge. The evidence as to such confession is spread upon the trial record (Trial Record, 432, 497, 499, 479, 501). In addition to such confession, the prosecutor introduced in evidence at the trial petitioner's statement to the government agents, admitting his transportation from Texas to New York of property acquired from Mary Ashe (Trial Record, 431, 474, 496). In his summation to the jury, the prosecutor emphasized the importance of petitioner's statements to the government agents while petitioner was under arrest (Trial Record, 564-5).

There can be no dispute that petitioner's alleged oral confession and other admissions attributed to him and received in evidence against him at his trial were *solely* the result of petitioner's arrest in Maryland.

There can be no dispute, too, that the knowledge of the fact of petitioner's marriage to Clara Duerr Walker was the result of petitioner's arrest. Such knowledge came to the government agents when they discovered an envelope bearing the name of Clara D. Walker in petitioner's luggage after his arrest (Trial Record: 22, 386, 481-2, 492). Therefore, it is evident that the knowledge obtained by the government of petitioner's marriage to Clara Duerr Walker and his bigamous relationship with Sally Grehan and Mary Ashe, which evidence was damaging to petitioner at his trial, was solely the result of petitioner's arrest.

It can be argued with reason, too, that the hostile attitude of Mary Ashe, the principal witness for the government, was the result of the illegal discovery of the Clara Duerr Walker envelope after petitioner's arrest upon the Kentucky charge. That such argument is reasonable is supported by the fact that Mary Ashe considered petitioner a gentleman until his arrest (377), and, on the day of petitioner's arrest, made a statement absolving him of any wrongdoing regarding her (Trial Record: Court's Exhibit 2, 659, 438); and then, after the discovery of the Clara Duerr Walker envelope revealing that petitioner was guilty of bigamy, Mary Ashe retracted her former statement and accused him of the crime subsequently charged against him in New York (Trial Record: 441).

While we can argue, with reason, that all of the trial evidence flowed directly or indirectly from petitioner's arrest, there can be no dispute that at least the evidence consisting of petitioner's alleged oral confession and of other admissions by him, of the Clara Duerr Walker envelope and of the testimony of Mary Ashe, was *solely* the result of petitioner's illegal arrest.

Therefore, we must conclude that the District Court's finding that the record does not disclose that the conviction was predicated "upon evidence obtained by the government solely as a result of such assumed illegal detention and search" is contrary to fact and is not supported by the trial record.

It is the law that once an illegal confession infects a trial, the verdict of guilt must be set aside, no matter how free of taint the other evidence may be.

> *Malinski* v. *New York,* 324 U. S. 401;
> *Stroble* v. *California,* 343 U. S. 529, 72 S. Ct. 599.

At the hearing provided for by 28 U. S. C. A., § 2255, and which petitioner was denied, he might have offered evi-

dence in support of the allegations of his petition. Such proof would have related to the insufficiency of the complaint, to the invalidity of the warrant, to the illegality of the arrest, to the failure of the government to file promptly the warrant and complaint after petitioner's arrest, to the vain efforts of petitioner to secure copies of the warrant and complaint prior to his trial and conviction, to the suppression of the warrant and complaint by government officials, and to the evidence, including petitioner's alleged confession and other admissions, resulting from petitioner's arrest and used against him in his indictment, trial and conviction in New York.

Since the District Court in the case at bar decided the petition without granting the petitioner a hearing and without making findings of fact and conclusions of law, as required by statute and by the decisions of this Court, the Court of Appeals was in error in affirming the order appealed from and petitioner is entitled to the hearing denied to him.

POINT II

Petitioner's arrest was illegal, for the warrant of arrest was void in that it was issued upon an insufficient complaint.

The Court of Appeals has held in its opinion that the complaint, upon which the arrest warrant was issued, was sufficient. We respectfully submit and will now prove that the complaint was insufficient.

At the outset, we wish to reiterate the fact that the Kentucky complaint involved a charge other than that in the case at bar. We wish to point out, too, that the Kentucky charge was dismissed upon motion of the United States Attorney, who expressed the opinion that he was unable to make out a case (5, 25).

It is petitioner's contention that his arrest upon the Kentucky charge, and the evidence resulting from such arrest, led to his indictment, trial and conviction in New York; that the government agents, seeking evidence upon one charge, violated petitioner's rights and discovered evidence of another crime.

Section 2255 of Title 28, U. S. C. A., provides for the vacating of a sentence imposed in violation of law or subject to collateral attack.

The Fourth Amendment declares that no warrant shall issue, but upon probable cause, supported by oath or affirmation.

Rule 3 of the Federal Rules of Criminal Procedure defines a complaint as a written statement, under oath, of the essential facts constituting the offense charged.

Rule 4 of the Federal Rules of Criminal Procedure provides that a warrant of arrest shall issue only if the complaint discloses that there is probable cause to believe that an offense has been committed.

Rule 40 of the Federal Rules of Criminal Procedure requires that, upon the arrest of a defendant in another district, the papers shall be transmitted to the Clerk of the District Court where the prosecution is pending.

The entire complaint, exclusive of the caption, upon which the warrant of arrest was issued in the Eastern District of Kentucky reads as follows (19-20):

"Before Joseph J. Bradley, Lexington, Kentucky,
Name of Commissioner

The undersigned complainant being duly sworn states:

That on or about between May 1, 1946 and Dec. 20, 1946, at Lexington, Ky., in the Eastern District of Kentucky, John Donald Walker did unlawfully, knowingly and
name of accused

willfully transport in interstate commerce money and stocks of the approximate value of $18,000.00, which had theretofore been taken by him through fraud, knowing the same to have been so taken.

And the complaint further states that he believes that John W. Core, Sp. Agt. FBI, Louisville, Ky. is material witness in relation to this charge.

JOHN W. CORE
Signature of the Complainant
Sp. Agt. FBI
Official Title

Sworn to before me, and subscribed in my presence August 25, 1947.

JOSEPH J. BRADLEY
United States Commissioner."

Petitioner contends that the complaint is insufficient for two reasons: (1) It fails to set forth the facts constituting the offense charged, and (2) The government agent, who swore to the complaint, fails to set forth the source of his information.

A complaint must set forth the facts constituting the offense charged. The warrant of arrest may not be issued without lawful foundation.

Grau v. *United States*, 287 U. S. 124;
Byars v. *United States*, 273 U. S. 28.

The complaint in the case at bar merely alleges the unlawful transportation of stolen property by petitioner in interstate commence (33). It does not allege between what states the property was transported (33). It does not state that the property was transported from or to Kentucky, from or to another specified state; it does not state from whom the property was taken (33). There is a mere as-

sertion of a particular crime based on hearsay, without any allegation of facts (33).

The complaint, therefore, does not meet the test laid down by Rules 3 and 4 of the Federal Rules of Criminal Procedure and by the Fourth Amendment.

In sustaining the sufficiency of the complaint, the Court of Appeals has reasoned, in its opinion (at p. 289), as follows: Since an indictment may be in the language of the statute, and the complaint in the case at bar is in the language of the statute, the complaint, therefore, is sufficient. This reasoning ignores the fact that the Fourth Amendment provides that "No *warrant* shall issue, but upon probable cause, supported by oath or affirmation." It is because of this constitutional right, requiring proof of probable cause before the issuance of a warrant, that the courts have insisted that the complaint state facts sufficient to constitute the offense and that it be sworn to by a person who has personal knowledge of the facts.

In *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 355, 356, this Court said:

> "The complaint, which in substance is recited in the warant, was verified merely on information and belief and does not state facts sufficient to constitute an offense. (Cases cited.) The warant was improvidently issued and invalid on its face."

To the same effect:

> *United States* v. *Morgan*, 222 U. S. 274;
> *Simmons* v. *United States*, 18 F. 2d 85, 88.

In *Rice* v. *Ames*, 180 U. S. 371, 21 S. Ct. 406, 407, this court stated:

> "The first two complaints, which were dismissed, as well as the first count of the complaint under which

the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief."

It is well-settled that if a complaint is made upon information and belief, it must give the grounds of the affiant's belief and the sources of his information. A complaint not based upon the personal knowledge of the affiant, and unsupported by other proof, confers no jurisdiction upon the United States Commissioner to issue a warrant of arrest.

United States v. *Baumert* (D. C.), 179 F. 735;
United States v. *Wells* (D. C.), 225 F. 320;
United States v. *Ruroede* (D. C.), 220 F. 210.

In *United States* v. *Gokey*, 32 F. 2d 793, 795, the court said:

"* * * The complaint, therefore, becomes nothing more than a statement of the commission of a crime, based upon hearsay. Although made upon the positive oath of the complainant, it is in reality a complaint based upon information and belief, and nothing more. The positive averments of an official as to facts not within his personal knowledge may be enough to protect a commissioner, but they should not be sufficient to confer jurisdiction, in violation of the Constitution and the numerous decisions of the courts. The complaint must, therefore, be held insufficient."

Before issuing a warrant of arrest, the commissioner should have before him the oath of the real accuser of the facts on which the charge is based or upon which the belief or suspicion of guilt is stated (In re Rule of Court (c. e.) Ga. 1877, Fed. Cas. No. 12, 126).

The real accuser in the Kentucky proceedings against the defendant was Sally Grehan, yet he is not the affiant in the complaint upon which the warrant of arrest was issued in Kentucky; nor does agent ore state that she is the source of his information (19).

In *Worthington* v. *United States*, 66 F. 2d 557, 562, 564, the Circuit Court of Appeals for the Sixth District wrote:

> "• • • If the information at the disposal of an arresting officer is wholly insuffent to justify the issuance of a warrant for arres*an arrest in such a case with an invalid warrant, with no warrant at all, would be an illegal arrest.* • • •"
>
> "*What is set forth as the requ*ement for evidence *to justify the issuance of a sea*warrant, applies *equally to a warrant* for arrest nd neither search warrant nor an arrest with or thout warrant can be made in any case without pe nal knowledge on the part of the official making a ication for a warrant, or the officer making the arre without a warrant, of facts that would be competen in the trial of the offense before a jury." (Italics urs.)

Agent Jones had no reason, othe han the warrant, to place petitioner under arrest. He mitted that, at the time he made the arrest, he had nc rsonal knowledge of the facts constituting the charg against petitioner (Trial Record, 73).

In the light of the Fourth Amend t, of the Federal Rules set forth above, and of the cas ited, it is evident from an examination of the compla that it is insufficient as a matter of law, that the w ant of arrest was not lawfully issued, and that petit r's arrest there-under was illegal.

POINT III

Petitioner's waiver of examination at his arraignment after his arrest does not bar him from now attacking the complaint, the warrant of arrest, and all the evidence obtained while he was under such illegal arrest.

In its opinion (197 F. 2d 287, 289), the Court of Appeals stated that petitioner's failure to attack the sufficiency of the complaint at his arraignment upon his arrest in Maryland constituted a waiver by him and he is thereby concluded.

The attention of this court is respectfully directed to the fact that the Court of Appeals, in erroneously holding that a waiver of examination upon arrest thereafter deprives a prisoner of the fundamental right to attack a process insufficient to confer jurisdiction, completely overlooked and misconstrued the two authorities cited in support of their opinion. The two authorities cited, namely *United States* v. *Ruroede,* 220 F. 210, 213, and *United States ex rel. King* v. *Gokey,* 32 F. 2nd 793, 795, hold *exactly contrary* to the views expressed by the Court of Appeals in the case at bar, and are firm authority in support of the contention of petitioner. Attention is specifically directed to footnote six (6) of the opinion of the Court of Appeals in this case (197 F. 2nd at page 289), which quotes in part the Ruroede decision, deleting, as denoted by the three asterisks, the pertinent substance of the ruling. Footnote six (6) of the Court of Appeals' opinion reads as follows:

> "See United States v. Ruroede, D. C. S. D. N. Y., 220 F. 210, 213, where Judge Augustus N. Hand said: 'His waiver will prevent him, as I have heretofore said, from objecting to informalities or irregularities in the warant or in the complaint. * * * The prisoner has a right to have evidence produced in support of

the complaint and to produce evidence on his part in answer thereto; in other words, to have the benefit of a preliminary examination. If he does not desire to have it and waives it, he cannot thereafter claim that he should have had it. In other words, the waiver is as broad as the privilege and nothing more'. Compare United States ex rel. King v. Gokey, D. C. N. D. N. Y., 32 F. 2d 793, 795."

The *full text* of the pertinent part of the Ruroede opinion holds precisely contrary to the opinion of the Court of Appeals in this case, and reads as follows:

"His waiver will prevent him, as I have heretofore said, from objecting to informalities or irregularities in the warrant or in the complaint; **but it does not, I think, debar him from attacking a process which does not upon its face state the facts which constitute the crime charged.** The meaning of the waiver is, I think, simply this: The prisoner has a right to have evidence produced in support of the complaint and to produce evidence on his part in answer thereto; in other words, to have the benefit of a preliminary examination. If he does not desire to have it and waives it, he cannot thereafter claim that he should have had it. In other words, the waiver is as broad as the privilege and nothing more. **He has never by any conduct of his waived the right to object to the fact of being held upon a complaint which states no cause of action and upon a process which is, therefore, void.**"

We have set forth in bold type above the pertinent parts of the Ruroede opinion which the Second Circuit Court of Appeals *omitted* in quoting from that case and for which the Court substituted asterisks.

In misconstruing the Ruroede decision and in failing to quote the opinion in that case completely, the Court of Appeals committed obvious error.

It is well settled that a waiver of examination upon arraignment does not estop a defendant from later attacking the sufficiency of the complaint.

In *United States* v. *Gokey*, *supra*, at page 795, the Court said:

> "6. The fact that the records show that relator upon arraignment waived examination, and consented to await the action of the District Court, does not estop him from now questioning the legality or sufficiency of the complaint. A waiver of examination, if one is had, debars a prisoner from thereafter questioning informalities or technical objections to the regularity of the proceeding, but it does not, I think, deprive him of the right to attack a process insufficient to confer jurisdiction. U. S. v. Ruroede (cited above); People ex rel. Perkins v. Moss, 187 N. Y. 410, 80 N. E. 383, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309."

In the District Court and in the Court of Appeals, the United States Attorney contended—that petitioner's failure to raise, upon his appeal from his conviction, the point which he now urges—is fatal to his proceeding to vacate the judgment (31). This contention ignores the fact that the insufficiency of the complaint was suppressed by government officials and was discovered only recently by petitioner, on *October 12, 1951*, three months after the affirmance of his conviction (6-7).

Petitioner's failure to discover the insufficiency of the complaint prior to his trial was not caused by any neglect on his part, but was caused solely by the fact that the complaint was suppressed and not duly filed in court as required by law. The correspondence attached to petitioner's moving papers establishes conclusively the efforts made by him, while incarcerated, to secure a copy of the complaint and of the warrant of arrest prior to his trial and conviction (20-4; 39-59).

As late as August 20, 1951, after petitioner's conviction was affirmed by the Court of Appeals, the Clerk of the District Court of the Eastern District of Kentucky acknowledged in a letter to petitioner that the warrant of arrest was not on file in that court (7; Exhibit F, 22). On September 12, 1951, the Clerk of the United States District Court for the District of Maryland also acknowledged that the warrant of arrest was not on file in that court (Exhibit G, 23).

On *January 3, 1952*, the Clerk of the Court admitted, in reply to a written inquiry by petitioner, that the complaint was only *recently* located among the commissioner's records (57-9).

The insufficiency of the complaint was suppressed from the petitioner, for, due to a violation of law, and particularly Rule 40 of the Federal Rules of Criminal Procedure, the complaint was not duly filed in the office of the Clerk of the Court where the warrant of arrest was issued.

Since the Clerk of the Court has, himself, acknowledged that the complaint was only recently located, there is, therefore, no merit to the contention of the United States Attorney that petitioner's failure to raise the point at his trial and upon his appeal bars him from attacking the judgment in this proceeding under 28 U. S. C. A., § 2255.

POINT IV

Petitioner's arrest being illegal, the evidence obtained therefrom, including petitioner's confession, was also illegal and, therefore, incompetent to support the judgment of conviction.

In Point II we have established the insufficiency of the complaint, the invalidity of the arrest-warrant, and the illegality of petitioner's arrest. In Point III we demonstrated that petitioner, upon the facts of this case, has not waived his right to attack the complaint and his arrest thereunder.

We now intend to prove that the evidence that resulted from petitioner's illegal arrest was thereby rendered illegal and is incompetent to support his conviction.

Such evidence has been detailed in Point I and will not be repeated here except by reference (Point I, pp. 12-18). Such evidence consists of petitioner's alleged oral confession and other admissions at the time of his arrest (Trial Record: 432, 496-7, 499, 479-80, 501, 431, 474); of the envelope seized from petitioner's luggage after his arrest, disclosing petitioner's marriage to Clara Duerr Walker and his bigamous relations with Mary Ashe (Trial Record: 22, 386-7, 482-3, 492); the testimony of Mary Ashe, who, after first making a statement absolving petitioner of any wrongdoing, turned against petitioner after the seized envelope disclosed that petitioner was guilty of bigamy (Trial Record: 659, 441, 659, 83-118, 231-48).

The search made by the government agents consisted of a general rummaging through petitioner's luggage for anything the agents might find, and resulted in the seizure of petitioner's private and personal letters, after the smashing of the lock on one of his bags. The letters seized were in no manner used to perpetrate the alleged Kentucky crime for which petitioner was then under illegal arrest and detention.

In holding against petitioner herein, the Court of Appeals, in its opinion, stated:

> "The evidence obtained by search was found in the appellant's luggage which was in the possession of Mrs. Ashe, who consented to the search. As we stated on the prior appeal, United States v. Walker, 190 F. 2d 481, 483, the appellant had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession."

The above holding of the Court of Appeals in the case at bar is precisely contrary to the ruling of the Court of

Appeals for the District of Columbia in *Jeffers* v. *United States*, 187 F. 2d 498, which was affirmed by this Court in 342 U. S. 48. The Court of Appeals in the Jeffers case said at pages 501-2:

> "We believe the correct rule to be that one who seasonably objects to the use in evidence against him of property he owns which has been seized as the fruit of an unlawful search or otherwise in violation of the Fourth Amendment is entitled to its exclusion *though the premises searched were not his.* He is a 'victim' of * * * and 'aggrieved' by * * * violation of the Fourth Amendment. To deny him standing to object would be inconsistent with the purpose of the exclusionary rule to make the amendment effective; for it condemns unreasonable seizures as well as unreasonable searches and applies to 'effects' as well as to 'houses'." (Italics ours.)

The search was made without a warrant, and its legality depended entirely upon the validity of petitioner's arrest. The arrest was illegal, and the evidence and proof of such illegal arrest was suppressed and made unavailable to petitioner until after his trial and conviction.

In affirming the decision of the Circuit Court of Appeals for the District of Columbia, this Court, in *United States* v. *Jeffers*, 342 U. S. 48, 72 S. Ct. 93, stated the following:

> "The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures and its protection extends both to 'houses' and 'effects'. Over and again this court has emphasized that the mandate of the Amendment requires adherence to judicial processes."
>
> "Only where incident to a *valid arrest,* or in exceptional circumstances, may an exemption lie from judicial processes required by Fourth Amendment, and then the burden is on those seeking the exemption to show the need for it."

It would seem, therefore, that the fact that the premises were not the petitioner's did not make the search of his luggage legal.

The illegality of the search and seizure rests upon a more fundamental reason than lack of consent and that is, that the search and seizure resulted from an illegal trespass upon the person of the petitioner, based upon a void warrant, in violation of the Fourth Amendment.

In *Nueslein* v. *District of Columbia,* 115 F. 2d 690, 692, 693-5, Vinson, J., now Chief Justice of this Court, wrote:

> "The crucial thing 'found' in this 'search' was a declaration of fact by the defendant that has become decidedly incriminating. * * *.
>
> "*The officers violated the security of the defendant under the IVth by unlawfully coming into his home and by placing him in custody.* The defendant's statement to the officers that he was driving the cab now incriminates him, even though he does not fall within the Vth because it does not come under the category of testimonial compulsion, a concept which has broadened as has the 'security' of the IVth. *But how did the officers find themselves in position to see and hear the defendant?* The officers, in the pursuance of a general investigation, entered the home under no color of right. They did not know that the defendant was driving the car; *they did not know that any offense had been committed.*
>
> * * * * *
>
> "*It has been held that a confession does not make good a search illegal at its inception. This is a part of the broader rule that an illegal search cannot be legalized by what it brings to light. That rule should not be narrowed even though an admission or confession is obtained.*
>
> * * * * *

> "* * * the protection granted by constitutional provisions must not be dealt with as abstractions. A simple, effective way to assist in the realization of the security guaranteed by the IVth Amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home."

To the same effect:

United States v. *Setaro*, 37 F. 2d 134, 137.

The opinion of the Court in the *Nueslein* case answers the statement of the Court of Appeals of the Second Circuit in the case at bar to the effect that, since petitioner's confession was voluntary, the fact that it was made while petitioner was under illegal arrest did not make it incompetent. In the *Nueslein* case, the Court condemned the confession, not because of any violation of the Fifth Amendment, but rather because, although made voluntarily, the confession was secured as a direct result of a violation by the government agents of petitioner's constitutional rights under the Fourth Amendment.

The recent case of *United States* v. *Carignan*, 342 U. S. 36, 72 S. Ct. 97, also supports petitioner's contention that his illegal arrest made illegal all the evidence obtained as a result of such arrest.

In the *Carignan* case, a majority of this Court sustained the admission of a confession only because the prisoner was then under *legal* arrest. Moreover, it is interesting to note that three of the justices, in dissenting, even held that the confession should have been excluded, for, in their opinion, *legal* detention upon one charge should not be used as a pretense to secure evidence of another crime. It is evident from the opinion of the majority in the *Carignan* case that, if the prisoner therein had been under unlawful arrest at the time of his confession, as in the case at bar, such confession would have been held inadmissible.

We desire again to make note of the fact that the charge for which petitioner was arrested in Maryland was subsequently dismissed after the United States Attorney for the Eastern District of Kentucky stated to the court as follows: "I have come to the conclusion that I am not able to make out a case in this Court and I have taken it up with the Attorney General with the view of getting authority to dismiss it" (5; Exhibit 1, 25).

The rule laid down in *McNabb* v. *United States*, 318 U. S. 332, is that *a confession is inadmissible if made during illegal detention.*

To the same effect:

Upshaw v. *United States*, 335 U. S. 410, 413.

The reason for the rule in the *McNabb* case is applicable to the case at bar. Petitioner was arrested pursuant to a void warrant based upon an insufficient complaint. His alleged oral confession to another crime was secured from him while he was under illegal detention, and such fact made the confession inadmissible at his trial.

The federal courts have adopted the policy of excluding evidence illegally obtained by a federal officer, whether the evidence so obtained was by unlawful invasion of his home or of his person, on the ground that to hold otherwise would be to require him to supply evidence against himself.

Weeks v. *United States*, 232 U. S. 383, 34 Sup. Ct. 341;

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, 40 Sup. Ct. 182;

Gouled v. *United States*, 255 U. S. 298, 41 Sup. Ct. 182.

For all of the foregoing reasons, we respectfully submit that all of the evidence that resulted from petitioner's illegal arrest was illegal and is incompetent to support the judgment of conviction.

POINT V

Petitioner is entitled to relief under 28 U. S. C. A., § 2255.

At the outset of its opinion (197 F. 2d 287, 288), the Court of Appeals stated, in support of its decision, that a motion under 28 U. S. C. A. § 2255, cannot ordinarily be used in lieu of an appeal to correct trial errors.

We agree that habeas corpus or a proceeding under Section 2255 of 28 U. S. C. A., cannot be substituted for an appeal. We concede that errors committed during a trial may not be reviewed by a proceeding under Section 2255 of 28 U. S. C. A., unless the errors involve the jurisdiction of the court or a deprivation of Constitutional rights amounting to a denial of the essence of a fair trial.

Meyers v. *United States*, 181 F. 2d 802.

The Court of Appeals has assumed, contrary to fact, that petitioner seeks to have reviewed errors committed at his trial. Petitioner rather seeks to review violations of his constitutional rights committed prior to his trial—at the time of his arest. These matters were not raised by petitioner at his trial and on his appeal because of the suppression by government officers of papers by which such illegal acts could be proven.

Where the facts, as here, are outside the record, they are not reviewable on appeal from the conviction and, necessarily, recourse must be had to habeas corpus or a proceeding under Section 2255 of Title 28 U. S. C. A.

The insufficiency of the complaint upon which the warrant of arrest was issued,—the invalidity of the warrant of arrest,—the illegal arrest of petitioner pursuant to the void warrant,—the inadmissibility of the alleged confession made by petitioner at the time of his unlawful ar-

rest,—the illegality of the other evidence secured by reason of petitioner's unlawful arrest,—are all matters that, through no fault of petitioner, were not known to him at the time of his trial and conviction and have come to his attention only recently.

As soon as the insufficiency of the complaint upon which the warrant of arrest was issued became known to petitioner, on October 12, 1951, when he secured a copy thereof from the files of the United States Attorney for the District of Maryland, he moved promptly under 28 U. S. C. A. § 2255, to vacate the sentence imposed upon him.

In *Smith* v. *United States*, 187 F. 2d 192, 197, 198, the Court of Appeals for the District of Columbia had this to say:

> "Where, however, the denial of constitutional right persists through lack of counsel or perjury undiscovered, or mob domination which saps all substance from the trial, or there is lack of jurisdiction or some other fundamental weakness in the judicial process which has resulted in the conviction, collateral attack is at hand, now under § 2255. For, ordinarily, appeal would be ineffective to preserve the right denied."

That is the situation in the case at bar. Petitioner herein does not seek to review any errors committed at the trial. He has gone outside of the trial record to establish a deprivation of constitutional rights. He has established that, due to a violation of law, the warrant of arrest and supporting complaint were not made available to him because such papers were not filed until December 31, 1949, if at all; and, if filed on that date, were irregularly kept and hidden in such a way as not to be available to petitioner upon request, for the Clerk of the Court, himself, on *January 3, 1952*, acknowledged that the complaint had been recently discovered by him among the commissioner's records (59).

The suppression of the complaint deprived petitioner of a fundamental right to attack its sufficiency and to have declared void the warrant of arrest which was issued thereon. If the complaint had been made available to petitioner in advance of trial, the trial court would have been compelled to hold that it was insufficient as a matter of law, that the warrant of arrest issued thereon was invalid, that petitioner's arrest pursuant to said warrant was illegal, and his alleged confession and other evidence obtained while petitioner was in illegal custody, were inadmissible against him at his trial.

For all of the foregoing reasons, petitioner respectfully submits that the matters complained of were not reviewable upon appeal and, therefore, he is entitled to seek relief under Section 2255 of Title 28 U. S. C. A.

The entire record in the case at bar discloses that the violation of the petitioner's rights are so fundamental as to render his indictment, trial and conviction wholly void.

> *Brown* v. *Mississippi*, 297 U. S. 278, 286;
> *Moore* v. *Dempsey*, 261 U. S. 86, 91.

We respectfully submit that we have demonstrated above that petitioner's indictment, trial and conviction in New York resulted from the suppression of evidence by government officers of his illegal arrest in Maryland upon another charge and upon the illegal evidence secured during petitioner's illegal detention.

For all of the foregoing reasons, it is respectfully submitted that the Court below was in error in denying petitioner relief under Section 2255 of Title 28 U. S. C. A. and, therefore, a writ of certiorari should be granted.

Conclusion

Since (1) petitioner's indictment, trial and conviction in New York resulted from petitioner's arrest in Maryland upon a warrant issued in Kentucky upon another charge, and (2) such arrest was illegal in that the warrant was issued on an insufficient complaint, and (3) the illegality of the arrest was suppressed from petitioner due to the government's failure to file promptly the warrant and complaint as required by law, and petitioner was thereby deprived of the opportunity at his trial of attacking his arrest and the evidence derived therefrom, and, therefore, did not waive the illegality in the proceedings that resulted in his indictment, trial and conviction, and (4) petitioner's indictment, trial and conviction rests upon evidence acquired as a result of his illegal arrest in violation of his rights guaranteed by the Fourth Amendment to the United States Constitution, and (5) Section 2255 of Title 28 of the United States Code provides for the vacating of a judgment imposed in violation of the Constitution or laws of the United States, the writ of certiorari prayed for by the petitioner should be granted.

Dated: September 27, 1952.

Respectfully submitted,

PETER L. F. SABBATINO,
Counsel for Petitioner.

PETER L. F. SABBATINO,
THOMAS J. TODARELLI,
EDWARD J. FONTANA,
Of Counsel.

Appendix

Constitution, Statutes and Ru volved

A (UNITED STATES CONSTI)

AMENDMENT IV.

"The right of the people to be e in their persons, houses, papers and effects, t unreasonable searches and seizures, shall not olated, and no warrants shall issue, but upon ble cause, supported by oath or affirmation, and ularly describing the place to be searched, and t rsons or things to be seized."

AMENDMENT V.

"No person shall be held to ans for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, exce cases arising in the land or naval forces, or in the tia, when in actual service in time of war or publ nger; nor shall any person be subject for the same nse to be twice put in jeopardy of life or limb; no all be compelled in any criminal case to be a witn against himself, nor be deprived of life, liberty, o operty, without due process of law; nor shall p te property be taken for public use, without just pensation."

B (Federal Rules of Criminal Procedure)

"Rule 3. The Complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States. * * *"

"Rule 4. Warrant or Summons Upon Complaint.

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. * * *"

"Rule 40. Commitment to Another District: Removal.

(3) Hearing; Warrant of Removal or Discharge. * * * If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, *the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.*" (Italics ours.)

C (UNITED STATES CODE)

Section 2255 of Title 28 provides in part, as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and Rule involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

CASES:

Birtch v. *United States*, 173 F. 2d 316, certiorari denied, 337 U.S. 944 **10**

Burall v. *Johnson*, 134 F. 2d 614, certiorari denied, 319 U.S. 768 10

Carter v. *United States*, 173 F. 2d 684, certiorari denied, 337 U.S. 946 8

McNabb v. *United States*, 318 U.S. 332 9

Price v. *Johnston*, 125 F. 2d 806, certiorari denied, 316 U.S. 677 10

Rice v. *Ames*, 180 U.S. 376 9

Smith v. *United States*, 187 F. 2d 192, certiorari denied, 341 U.S. 927 10

United States v. *Gokey*, 32 F. 2d 793 9

United States v. *Ruroede*, 220 Fed. 210 9

United States v. *Walker*, 190 F. 2d 481, certiorari denied, 342 U.S. 868, rehearing denied, 342 U.S. 899 4, 9, 10

United States v. *Walker*, 176 F. 2d 564, certiorari denied, 338 U.S. 891 4, 10

STATUTES AND RULE:

National Stolen Property Act, Sec. 3, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178, 18 U.S.C. (1946 ed.) 415, now 18 U.S.C. 2314 2, 3, 4, 8

Judicial Code, Sec. 2255, 28 U.S.C. 2255 3, 5, 10

Federal Rules of Criminal Procedure, Rule 3 4, 8

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 363

JOHN DONALD WALKER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion in the Court of Appeals (R. 66-70) is reported at 197 F. 2d 287.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1952 (R. 71). On September 1,

1952, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to and including September 27, 1952 (R. 72), and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sentence previously sustained on appeal may be attacked by motion under 28 U.S.C. 2255 on the ground that there was admitted in evidence at the trial a confession obtained after an arrest based upon an insufficient complaint.

STATUTES AND RULE INVOLVED

Section 3 of the National Stolen Property Act, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178, 18 U.S.C. (1946 ed.) 415, provided, in pertinent part, as follows:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, * * * shall be punished by a fine of not more than $10,000 or

by imprisonment for not more than ten years, or both * * *.[1]

Section 2255 of the Judicial Code, 28 U.S.C. 2255, provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or in-

[1] This section is now incorporated with minor changes in 18 U.S.C. 2314.

> fringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * * * * * *

Rule 3 of the Federal Rules of Criminal Procedure provides:

> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

STATEMENT

Petitioner was convicted of having transported, from Houston, Texas, to New York City, sums of money "taken feloniously by fraud or with intent to steal or purloin." 18 U.S.C. (1946 ed.) 415 (now 18 U.S.C. 2314). *United States* v. *Walker*, 190 F. 2d 481 (C.A. 2), certiorari denied, 342 U.S. 868, rehearing denied, 342 U.S. 899. An earlier conviction had been reversed and a new trial ordered because of an error in the admission of evidence. *United States* v. *Walker*, 176 F. 2d 564 (C.A. 2), certiorari denied, 338 U.S. 891.

After the denial by this Court of his petition for certiorari to review the affirmance of his conviction

on retrial, petitioner filed an application for relief under Section 2255 of the Judicial Code. He there advanced for the first time the contention that his conviction was invalid because it was based on the admission in evidence at the trial of (1) statements obtained during a period when he was allegedly under illegal arrest, and (2) testimony obtained and facts discovered by search of his trunks, to which he apparently consented, during this same period (R. 5, 8, 9).

The circumstances of the alleged illegal arrest were these. In August 1947, a complaint against petitioner was filed before a United States Commissioner for the Eastern District of Kentucky, reading in relevant part, as follows (R. 19-20):

> Before Joseph J. Bradley, Lexington, Kentucky, Name of Commissioner
>
> The undersigned complainant being duly sworn states:
>
> That on or about between May 1, 1946 and Dec. 20, 1946, at Lexington, Ky., in the Eastern District of Kentucky, John Donald Walker did unlawfully, knowingly and * * * wilfully transport in interstate commerce money and stocks of the approximate value of $18,000.00, which had theretofore been taken by him through fraud, knowing the same to have been so taken.
>
> And the complaint further states that he believes that John W. Core, Sp. Agt. FBI,

Louisville, Ky. is material witness in relation to this charge.

JOHN W. CORE
Signature of Complainant.
Sp. Agt. FBI
Official Title

A warrant for petitioner's arrest was issued (R. 11) and on August 29, 1947, he was arrested in Cumberland, Maryland (R. 13).[2] On September 10, 1947, with the consent of petitioner (R. 17-18), he was ordered removed to the Eastern District of Kentucky (R. 14-17).

The complaint, pursuant to which petitioner was arrested, related to certain transactions between petitioner and his second "wife", Sally Grehan (R. 29). On October 20, 1947, petitioner was indicted in connection with these transactions (R. 5), but on June 14, 1948, the United States Attorney for the Eastern District of Kentucky concluded that he would be unable to prove a case under this indictment, and dismissed it (R. 5).

However, while petitioner was in custody pursuant to the Kentucky complaint and warrant, he made certain statements which resulted in the later indictment and conviction in New York which is the subject of the present collateral attack. Spe-

[2] The warrant of arrest pursuant to which petitioner was actually taken seems to have been issued pursuant to the complaint filed in Maryland by one Jones, another agent of the FBI, whose basis for action must have been the Kentucky complaint and warrant (see R. 12-14).

cifically, he confessed his guilt of having transported across state lines money fraudulently obtained from Mary Ashe, another of his "wives" (R. 9). And he consented to a search of certain pieces of his luggage then in the possession of Mary Ashe (who also consented to their search). As a result of this search, the existence of Clara Duerr Walker, in fact petitioner's wife, was discovered for the first time (R. 5).

Alleging that without the admission of this evidence he would not have been convicted,[3] petitioner filed the present petition for vacation of the judgment of conviction (R. 10). He excused his failure to raise this objection earlier by stating that he was unable earlier to get the complaint pursuant to which the warrant of arrest was issued. He supported this assertion by papers showing efforts by letter, beginning only after the affirmance of his conviction by the Court of Appeals in 1951, and by mere statements that he had endeavored unsuccessfully to secure a copy of the complaint from the clerk of the District Court for the Eastern District of Kentucky "prior to December 31, 1949" (R. 36).

The District Court denied the motion (R. 52) and on reargument adhered to its views (R. 60). The Court of Appeals affirmed (R. 71), holding

[3] Petitioner argued that the disclosure of Clara Duerr Walker's existence caused Mary Ashe, the principal witness for the Government, to change from a friendly to a hostile attitude toward petitioner (See R. 8 and Pet. Pet. 17).

that even if a conviction could be collaterally attacked on the grounds asserted, petitioner had presented no grounds for relief since he had been legally arrested.

ARGUMENT

Petitioner argues that his arrest was illegal because based upon an insufficient complaint; that statements made during the period of illegal arrest were inadmissible in evidence; and that such error in the admission of evidence supports a collateral attack on the judgment of conviction, at least where there was a good reason, such as he alleged, for failing earlier to raise the objection. This argument is fallacious at every point.

1. The complaint was sufficient under Rule 3 of the Federal Rules of Criminal Procedure which requires that a complaint state "the essential facts constituting the offense charged," and that it be made under oath before a commissioner. The offense charged against petitioner was under 18 U.S.C. (1946 ed.) 415, the transmission across state lines of sums in excess of $5,000 knowingly obtained by fraud. Precisely those facts were charged against petitioner. While more details might have been alleged, even an indictment so stated in terms of the statute would be sufficient. *Carter* v. *United States,* 173 F. 2d 684 (C.A. 10), certiorari denied, 337 U.S. 946.

Moreover, a complaint is valid if, on its face, it purports to be based on the personal knowledge of

the complainant. Cf. *Rice* v. *Ames,* 180 U.S. 371, 376. This does not mean that a complaint cannot be challenged on a showing that there was not or could not have been such personal knowledge. But it does mean that a complaint valid on its face will not be later treated as void on the basis of a showing that could have been, but was not, promptly made.[4]

2. Even if the arrest were illegal, it would not follow that the evidence, obtained while petitioner was in custody, was incompetent.

Petitioner does not contend that his confession was involuntary. He relies on the rule of *McNabb* v. *United States,* 318 U.S. 332, holding inadmissible in evidence a confession obtained during a period of illegal detention arising from the failure of law enforcement officers to comply with the statutes requiring prompt arraignment. It is delay in arraignment and not illegality of arrest which underlies the *McNabb* rule. Here the complaint and warrant were not void, but at most voidable. The illegality, if any, of this kind of detention is not at all related to a purposive holding of a defendant as in the *McNabb* case,[5] and the rule

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[4] The cases on which petitioner relies are, for the most part, cases in which prompt challenge was made. See, e.g., *United States* v. *Rurowde,* 220 Fed. 210 (S.D. N.Y.); *United States* v. *Gokey,* 32 F. 2d 793 (N.D. N.Y.).

[5] The legality of the search of the luggage does not depend on the legality of the arrest. The search was consented to both by petitioner and by Mary Ashe, who had possession of it. See 190 F. 2d at 483 and R. 5, 8, 9.

of exclusion laid down in the *McNabb* case does not apply.

3. Moreover, petitioner has been through two trials of this case, in both of which he objected to the admissibility of the evidence, without raising the particular challenge he now makes. See 176 F. 2d at 566 and 190 F. 2d at 483. Although he attempts to excuse his failure on the ground that he was unable to get the complaint from the clerk of the Kentucky district, he is singularly vague in stating any efforts to do so prior to December 1949 over two years after his arrest. An objection to the admissibility of evidence even on constitutional grounds does not support a collateral attack by habeas corpus or by motion under 28 U.S.C. 2255. *Smith* v. *United States*, 187 F. 2d 192, 197 (C.A. D.C.), certiorari denied, 341 U.S. 927; *Birtch* v. *United States*, 173 F. 2d 316, 317 (C.A. 4), certiorari denied, 337 U.S. 944; *Burall* v. *Johnson*, 134 F. 2d 614 (C.A. 9), certiorari denied, 319 U.S. 768; *Price* v. *Johnston*, 125 F. 2d 806, 809 (C.A. 9), certiorari denied, 316 U.S. 677. Petitioner has shown no circumstances which would render this general rule inapplicable in this case.

Since, therefore, the motion to vacate stated no facts on which relief could be predicated, it was properly denied without a hearing.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 363

JOHN DONALD WALKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

We desire to make reply to certain matters in the respondent's brief.

(1)

There is not just one question presented in this proceeding, as is stated on page 2 of respondent's brief. There are, in fact, five questions presented, and such questions are fully set forth on pages 6 and 7 of petitioner's papers in this proceeding.

(2)

On page 7 of respondent's brief it is stated that petitioner's efforts to secure a copy of the complaint were begun only after the affirmance of his conviction by the Court of Appeals in 1951. Respondent's statement is not supported by the record.

On page 38 of the record in this case there is incorporated a letter, dated December 30, 1948, from the Clerk of the United States District Court for the Eastern District of Kentucky addressed to the petitioner herein from which it appears that, on December 27th, 1948, prior to petitioner's trial and conviction herein, he sought to obtain from the Clerk of the Court a certified copy of the record of the proceedings in the Kentucky case. Such request was made by petitioner one year *prior* to December 31, 1949, when the complaint was, according to the Clerk of the Court, filed with him (96), and *four* years prior to the discovery of the complaint by the Clerk of the court (175-6).

It is, therefore, apparent that petitioner sought to secure a copy of the complaint prior to his trial and conviction on May 31, 1950. In addition to the letter, dated December 30, 1948, of the Clerk of the District Court, establishing that petitioner herein at that time sought the record of the Kentucky proceedings, petitioner's petition in this proceeding contains his allegation, undenied by the respondent, that both prior to, and after December 31, 1949, he unsuccessfully sought to obtain a copy of the complaint in the Kentucky proceeding (37). Petitioner offered to submit, at a hearing, evidence of his efforts to secure, both prior and subsequent to December 31, 1949, a copy of such complaint, but the District Court summarily denied the petition without according petitioner the hearing to which he was entitled under 28 U.S.C.A. § 2255. The Clerk's letter of December 30, 1948, establishes that petitioner sought a copy of the complaint prior to his trial and conviction, and the record in this proceeding under 28 U.S.C.A. § 2255 discloses that petitioner was denied the opportunity of offering proof of the fact that he did seek to secure a copy of the Kentucky complaint prior to December 31, 1949.

(3)

To support the sufficiency of the complaint, which petitioner attacks, the Solicitor General states on page 8 of his brief that "even an indictment so stated in terms of the statute would be sufficient." This argument ignores the prohibition in the Fourth Amendment that "No warrant shall issue, but upon probable cause, supported by oath or affirmation." Moreover, even an indictment, stated in the language of the statute, must rest upon the sworn testimony of witnesses having personal knowledge of the facts and may be dismissed if it rests upon hearsay. In the case at bar, the warrant was issued upon a hearsay complaint of a federal agent who evidently had no personal knowledge of the facts. The objection, which petitioner makes to the complaint, is not as to form but rather as to substance.

(4)

On page 10 of respondent's brief, cases are cited to support respondent's point—that an objection to the admissibility of evidence even on constitutional grounds does not support a collateral attack by habeas corpus or by motion under 28 U. S. C. A. 2255. While the cases cited support respondent's point, they are inapplicable to the case at bar. Such cases relate to errors of the trial court in the admission of evidence, which errors are subject to correction on appeal. That is not the situation in the case at bar. Petitioner does not rely upon errors of the trial court in the admission of evidence. The admission of the illegal evidence, upon which his conviction rests, was not objected to by petitioner at his trial, and the queston was not raised on his appeal from his conviction, *because petitioner, due to the suppression of the complaint by federal officials, was ignorant, at the time of his trial and at the time of his appeal, of the invasion of his constitutional rights and of the illegality of the evidence adduced at his trial.*

For all of the reasons stated in petitioner's main brief and the reasons stated herein, we respectfully submit that a writ of certiorari should be granted.

Respectfully submitted,

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